

- (1) Whether the Administrative Law Judge erred in failing to consider the videotape offered into evidence by the respondent and its insurance carrier.

- (2) Whether the Administrative Law Judge erred in failing to consider a stipulation regarding Fund liability in Docket No. 190,259.
- (3) Whether the Administrative Law Judge erred in determining the nature and extent of claimant's disability.
- (4) Whether the Administrative Law Judge erred in determining the amount of compensation due the claimant.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

- (1) The Administrative Law Judge did not err in failing to consider the videotape of claimant's activities.

The record reflects that on November 29, 1995 Administrative Law Judge Robert H. Foerschler wrote counsel advising the record was closed at that time. On December 4, 1995 respondent's counsel forwarded the videotape to the Administrative Law Judge with a letter advising him that the parties, including the claimant and the Fund, had no objection to the introduction of the videotape or to the extension of the terminal date for that limited purpose.

The Administrative Law Judge states in his Award that the videotape was not considered because it arrived after the expiration of the terminal dates. Under the circumstances the Administrative Law Judge was not in error. The agreement by the parties is not binding on the Administrative Law Judge and does not require him to extend the terminal date. The decision not to consider the tape was a reasonable exercise of his discretion. As a part of its de novo review, the Appeals Board agrees with the decision and has excluded the evidence.

- (2) The Workers Compensation Fund should reimburse the respondent in the amount of \$3,000 pursuant to the stipulation entered into by and between respondent and the Fund.

Respondent argues and the Kansas Workers Compensation Fund agrees that these two parties stipulated that the Workers Compensation Fund would pay \$3,000 as a full and complete resolution of the liability of the Kansas Workers Compensation Fund in this claim. The Award makes no mention of this stipulation as it apparently was over- looked by the Administrative Law Judge. The Award is corrected below.

- (3) Claimant is entitled to benefits based upon a 45 percent permanent partial impairment of function to the left upper extremity at the shoulder level.

The trial of this case involved four consolidated claims. The claims included one for injury on December 3, 1992 to claimant's left hand while attempting to remove bags jammed in a machine (Docket No. 190,258); injury to claimant's left hand when claimant struck his left index finger on a bar of the machine on which he was working on October 20, 1993 (Docket No. 190,260); and injury to claimant's left and right upper extremity, from repetitive work activities beginning February 1, 1994 and continuing through the last day

worked in May 1994 (Docket No. 190,259). The fourth claim involved injury to claimant's right foot (Docket No. 190,484). At the time of the regular hearing claimant indicated he no longer had problems with his foot and made no further claim for permanent disability or other benefits for Docket No. 190,484. The three separately docketed claims for injury to claimant's left and right upper extremities were tried as a single injury and an Award was entered for one injury. None of the parties disputed this method of handling these claims. The Appeals Board has, therefore, likewise treated this as though it were a claim for a single injury. The determination regarding the nature and extent of claimant's disability is, as a result, a determination of the nature and extent of the combined disability for all three alleged injuries.

Respondent admits injury to claimant's left hand on December 3, 1992 but denies the separate injury to claimant's left hand on October 20, 1993, and denies the alleged repetitive injuries to claimant's left shoulder and right upper extremity.

After reviewing the record the Appeals Board agrees with the conclusion that claimant's injuries include his left shoulder and finds there is no permanent injury in claimant's right upper extremity. The Appeals Board also concludes that claimant suffered compensable injury on October 20, 1993 which resulted in a portion of the disability to be awarded in this case.

After the injury to claimant's left hand in December 1992, the injury which respondent admits, claimant was taken first to Bethany Medical Center and then to Kansas University Medical Center where he underwent surgery by Dr. Richard Bene. He was also treated by several other physicians, including Dr. Bradley Storm, one of the three physicians who testified. He was off work approximately 16 weeks and returned to restricted duty. Accordingly, claimant began having problems with his left shoulder almost immediately after he returned to work.

Claimant also testified that he then injured his left index finger in October 1993 when he pulled a bag loose and as the bag pulled free he struck his finger on a bar. Dr. Storm testified that the history claimant gave him led him to believe claimant fractured his finger at home but then displaced the fracture in the injury at work. In either event, the evidence that claimant impaired his hand at work is uncontroverted. The Appeals Board finds that claimant did have a work-related compensable injury on October 20, 1993.

The Appeals Board also concludes that claimant's injuries include injury to his left shoulder. When the parties could not agree upon the nature and extent of claimant's functional impairment, the Administrative Law Judge appointed Dr. Lynn Ketchum to conduct an independent medical examination. Although Dr. Ketchum initially rated claimant's impairment at the hand level, he subsequently corrected his rating to include the shoulder. Dr. Storm rated only claimant's left hand but acknowledged claimant made complaints in the shoulder area. Dr. Storm last saw claimant on August 1, 1994. At that time claimant had complaints to his left shoulder but Dr. Storm felt they were resolving. Claimant's regular hearing testimony given on July 14, 1995 indicates those complaints had not resolved. Dr. Ketchum's second examination of May 11, 1995 also confirmed that the shoulder problems had not resolved. Dr. James Hopkins did not include the left shoulder in his rating but does rate the claimant's impairment as one to the body as a whole. From our review of the record, the Appeals Board finds most convincing the opinion of the independent medical examiner, Dr. Ketchum, and therefore adopts that opinion, a rating of 45 percent at the shoulder level, as the finding in this case.

Neither Dr. Storm nor Dr. Ketchum found permanent impairment of claimant's right upper extremity. Only Dr. Hopkins, the physician hired by claimant's counsel, found basis for permanent impairment of the right upper extremity. Based on the record as a whole, the Appeals Board concludes that the Award should not include the right upper extremity.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler should be modified.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Clayton A. Nolan, and against the respondent, Sunshine Biscuits, Inc., and its insurance carrier, Industrial Indemnity, for an accidental injury sustained on December 3, 1992, and aggravated in October of 1993.

The claimant is entitled to 21.86 weeks temporary total disability at the rate of \$313.00 per week or \$6,842.18 followed by 91.41 weeks, at the rate of \$313.00 per week, in the amount of \$28,611.33 for a 45 percent loss of use of the left upper extremity at the shoulder level making a total award of \$35,453.51, which is ordered paid in one lump sum less amounts previously paid, or until further order of the Director.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 is also awarded to the claimant.

Pursuant to the stipulation between the respondent and the Workers Compensation Fund, the Fund is to reimburse respondent in the amount of \$3,000 for benefits paid by respondent in this case.

The Appeals Board adopts all other orders entered in the Award of December 28, 1995.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

Gene Dolginoff Associates, Ltd.	\$2,813.70
Richard Kupper & Associates	\$ 133.70

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

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**BOARD MEMBER**

- c: Keith L. Mark, Mission, KS  
Gary R. Terrill, Overland Park, KS  
J. Paul Maurin, III, Kansas City, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director